No. 92-1940

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTHONY S. MONTELEONE, et al.
Petitioner,

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO JUDICIAL DIST., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
ANN K. JENSEN
Supervising Deputy Attorney General
[Attorney of Record]
ENID A. CAMPS
Deputy Attorney General
455 Golden Gate Ave., Suite 6200
San Francisco, California 94102
Telephone: (415) 703-1591
Attorneys for Respondents

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35 pp

ISSUE PRESENTED

Whether the court can dismiss a habeas petition as moot where petitioners served substantial jail time by rejecting probation and did not demonstrate collateral consequences from their misdemeanor convictions for failure to file tax returns?

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No. 92-1940

IN THE
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OCTOBER TERM, 1993

ANTHONY S. MONTELEONE and
MARY ANN CUMMINS-MONTELEONE
Petitioners,

v.

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SOLANO
NORTHERN SOLANO JUDICIAL DISTRICT, et al.,
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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners seek review of an unpublished Ninth Circuit Court of Appeals Memorandum filed on December 8, 1992, which dismissed for mootness their consolidated appeals from a district court's denial of their 28 U.S.C. section 2254 habeas petitions. App. A, Consolidated cases: *Mary Ann Cummins Monteleone v. Municipal Court, et.al.*, Case No. 91-16725, D.C. No. CV-90-01448-LKK;

Anthony S. Monteleone v.Municipal Court, et. al., Case No. 91-16804, D.C. No. CV-90-01447-LKK.

The United States District Court for the Eastern District of California had denied petitioners' separate habeas petitions on the merits in unpublished opinions on October 15, 1991, after adopting extensive findings by the U.S. Magistrate filed on August 29, 1991, and August 30, 1991. App. B.

Petitioners' jury convictions stemming from state tax code violations previously had been affirmed on August 20, 1990, in unpublished written opinions by the State of California, Solano County Appellate Department, which found that petitioners had "attempted to abuse the judicial system," that the "record does not reveal any error of law," and that the trial judge gave petitioners "the opportunity to mitigate [their] punishment, but [they] failed to do so." App. C *People v. Mary Ann Cummins-Monteleone*, No. FC28088; *People v. Anthony Monteleone*, No. FC28087.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C § 1254(1).

On March 4, 1993, the Ninth Circuit Court of Appeals denied petitioners' petitions for rehearing and "suggestion for rehearing en banc" of the Court's December 8, 1992, Memorandum.

Whether the case is moot following petitioners' release from custody is at issue in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely upon the following Statutes and Rules: Title 28, U.S. Code Sections 2253 and 2254; Federal Rules of Appellate Procedure, Rule 22(b).

Respondent also relies upon the following federal executive and administrative agency orders and California statutes: (1) United States Office of Government Ethics *Standards of Ethical Conduct For Employees of the Executive Branch,* Part I, Executive Order 12674 and 5 C.F.R. Part 2635 (August 1992). App. F; (2) Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3. App. F; (3) Cal.Rev. & Tax Code, §§ 19401, 19406. App. E.

STATEMENT OF THE CASE AND OF FACTS

On October 19, 1988, the Solano County District Attorney filed complaint number F84281CR and F84282CR charging petitioners Mary Ann Cummins-Monteleone (M. Monteleone) and Anthony S. Monteleone (A. Monteleone), (collectively, "petitioners") with six misdemeanor counts as follows: (1) Willful and unlawful failure to file an income tax return from 1985-1987. (Count I-III, Cal. Rev. & Tax Code, § 19406); (2) Failure to file an income tax return and supply information required by the Revenue and Taxation Code from 1985-1987. (Count IV-VI, Cal. Rev. & Tax Code, § 19401(a)). *See, CR 18-24, Respondent's Appendix of Exhibits in Support of Answer in Opposition to Petitions for Writ of Habeas*

orpus, at Exhs. 1 and 2.[1/]

On or about March 14, 1989, petitioners received from the court, a copy of the complaint. Exh. 1 and 2. Petitioner, A. Monteleone, initially appeared for arraignment on April 6, 1989, at which time he was advised as to the charges pending against him. Exh. 1, p. 1; Exh.3, RT 4/6/89, p. 1. Petitioner represented that he had money to hire his own attorney and requested a continuance to seek counsel. Exh. 1, p. 1; Exh. 3, RT 4/6/89, p. 1.

Between April 6, 1989, on August 14, 1989, the court granted petitioner numerous continuances for the express purpose of retaining counsel upon petitioner's assurances that he had sufficient funds for this purpose. Exh. 1; Exh. 3. Specifically, the record reflects that the court granted petitioner continuances on the following dates: (1) April 6, 1989; (2) May 11, 1989; (3) June 1, 1989; (4) June 21, 1989; and (5) July 24, 1989. Exh. 1; Exh. 3, RT 4/6/89, pp. 1-2; RT 5/11/89, p. 1; RT 6/1/89, p. 1; RT 6/21/89, p. 1.

On August 14, 1989, A. Monteleone appeared without counsel for the sixth consecutive time since April 6, 1989. Exh. 1; Exh. 3. Over petitioner A. Monteleone's objection, the court entered not guilty pleas to the charges in the complaint. Exh. 1, p. 2.

Similarly, the court continued the M. Monteleone case seven times for counsel and plea. Exh. 2; Exh. 3,

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1. Unless otherwise noted, all references are to exhibits which are found in Respondents' Appendix to Answers, Exhs.1-11 listed in the Court of Appeals docket sheet as CR 18-21 in the A. Monteleone case and CR 21-24 in the M. Monteleone case.

RT 8/29/89, pp. 11-18; Exh. 3, RT 4/4/89, p. 1.

On August 29, 1989, petitioner M. Monteleone, appeared again in court without counsel. Exh. 2; Exh. 3, RT 8/29/89, pp. 11-18; Exh. 3, RT 9/20/89 p. 31.

The court then entered a plea of not guilty on petitioner M. Monteleone's behalf. Exh. 3, RT 8/29/89, p. 14.

The court set trial for September 19, 1989, with petitioner's "co-defendant [A. Monteleone], who's also been engaged in the same type of conduct, attempting to delay the process of the Court." Exh. 3, RT 8/29/89, p. 14.

On September 19, 1989, petitioners appeared in court without counsel. Exh. 1, p. 4; Exh. 3, RT 9/19/89, pp. 1, 4. The court, Judge Udall was disqualified pursuant petitioners' California Penal Code section 170.6 motion. Exh. 3, RT 9/19/89, p. 3.

The trial commenced on September 20, 1989. Exh. 3, RT 9/20/89 p. 39. Petitioners were given a copy of the jury instructions, but refused to look at them. Exh. 3, RT 9/20/89 (In Chambers) pp. 1-7.

Neither petitioner M. Monteleone nor Petitioner A. Monteleone were represented by counsel at trial. Exh. 1, pp. 4-6; Exh. 2, pp. 5-7.

Prior to trial, the court denied petitioner M. Monteleone's motion to continue the trial, finding that petitioner "had adequate time to obtain counsel and prepare for trial." CR 21-24, Exh. 2, p. 5.

Petitioner A. Monteleone had refused to "sign [the] financial declaration [to obtain appointed counsel] under penalty of perjury." Exh. 1, p. 4. Accordingly, the court would "not appoint counsel." Exh. 1, p. 4; Exh. 3, RT

9/20/89, pp. 6-23.

In response to petitioner's request for appointment of counsel and for a continuance, the court stated as follows:

> "The matters were both put over seven times for you to hire attorneys. . . . It's obvious to the Court that what you were doing was, basically, delaying the Court process by indicating you were mailing letters to attorneys. But in any event, it was the Court's feeling you did not intend to retain counsel; obvious you were doing nothing more than dealing with dilatory obstruction of process to delay this matter in court. I put this matter over for jury trial during the last court appearance. You've had until today to retain counsel." Exh. 3, RT 9/20/89 p. 3.

Prior to trial, the court also denied petitioners' *Marsden* motion on the ground he could not "discharge an attorney you don't have." Exh. 3, RT 9/20/89 p. 36. The court observed, "Maybe that was . . .the next step after you hired a lawyer. Maybe you filed that prematurely." Exh. 3, RT 9/20/89 p. 36.

On September 20, 1989, a jury found petitioners guilty on all counts alleged in the complaint. Exh. 1, pp. 5-6; CR 21-24, Exh. 2, p. 7.

At trial, Petitioner M. Monteleone professed to have such knowledge of the judicial system that she could tell the court what the district attorney was required to file, but also professed to have no understanding of the proceedings against her. CR 21-24. Exh. 3, RT 9/20/89

pp. 24-25, passim.

Evidence at trial and the related hearings showed that petitioner A. Monteleone had recently retired from the military and was previously employed at Mare Island. Exh. 3; Exh. 3, RT 10/27/89 p. 70. Petitioner M. Monteleone was employed with the F.A.A. as an Air Traffic assistant. Petitioner M. Monteleone was a member of "The Free Enterprise Society in Fresno," and petitioners had not filed a tax return since 1982. Exh. 3, RT 10/27/89 p. 71, RT 8/29/89, pp. 11-18, RT 9/20/89 p. 31.

After trial, petitioners appeared without counsel for sentencing. Exh. 3, RT 9/20/89 p. 43. The district attorney requested that petitioners receive the "maximum time" for their offenses. Exh. 3, RT 9/20/89 p. 43. The court informed petitioners that it was "willing [to] . . . put the sentencing matter over so [they could] file [their] income tax returns." Exh. 3, RT 9/20/89 p. 45.

On October 3, 1989, petitioners appeared in court for sentencing without counsel. Exh. 3, RT 10/03/89 pp. 52-58. Petitioners, again, requested additional time, and waived time for sentencing. Exh. 3, RT 10/03/89 pp. 55-56.

Petitioner M. Monteleone said she had money only to pay her attorney to handle the "new trial." Exh. 3, RT 10/03/89 pp. 54-55. Petitioner said her attorney, Mr. Fallman would be available on October 27, 1989, and the court continued the case to that date. Exh. 3, RT 10/03/89 p. 58.

On October 27, 1989, petitioners appeared in court for sentencing without counsel representing them directly. Exh. 3, RT 10/27/89 p. 59. Petitioner M. Monteleone told

the court that her attorney, Mr. Fallman was "in the courtroom today," and would be retained if the court granted a new trial. Exh. 3, RT 10/27/89 p. 59.

The court noted for the record, all of the reasons that it would not grant the motion for a new trial, citing again, petitioners' dilatory tactics. Exh. 3, RT 10/27/89 pp. 60-67.

On October 27, 1989, prior to sentencing, the court addressed petitioners and observed as follows.

"[¶] The Court: All right. Appears there's no legal cause why judgment and sentence should not be imposed. . . . [¶] I'll suspend imposition of judgment and sentence. I'll place you on probation for a three-year period under the supervision of the Solano County Probation Department. It will be formal probation. [¶] As I indicated to you before, I don't understand. Normally, the people I get in here on tax-protest type cases are those people where they're either undereducated or don't understand the system. Both of you appear to be quite intelligent. [¶] I don't know what caused you to buy into this idea you think you're going to be able to get out without paying taxes like everybody else does. [¶] Most of the people I have here on tax cases like this do not work for the government. [¶] I mean, Mrs. Monteleone, you work for the FAA, I think you said, as an Assistant Air Traffic Controller; so, all your income comes from the government. . . . Mr. Monteleone is retired military, so, his whole -- his money comes directly from the government, all comes from the taxpayers. [¶] He was previously employed at Mare Island, all tax money. You've been on the public dole for as long as I

can see. [¶] So, I've never had those kind of people. People who protest taxes don't normally work for the government . . . All your income is derived through public monies. . . . I mean, we all would have a lot more money if we didn't pay our taxes. That's the bottom line. [¶] You have not filed a return since 1982, it appears. I think the taxes you owed were $180,000. I can't recall the exact amount. [¶] You've never been underemployed or underprivileged, it looks to me, and you've had good incomes, just failed to pay your taxes, and it seems like the Franchise Tax Board has been very patient with you. [¶] I can't believe, since 1982, it just gets to trial in 1989. They've given you ample opportunity, contacted you by person and by mail, and you continue to assert these ridiculous constitutional arguments that no Court in the land has ever accepted, and will never accept, I assure you. [¶] Any lawyer will probably tell you that who you discussed the matter with. [¶] The Federal Courts have been coming down on tax protesters. One of the leaders of the tax protest movement a couple years ago got something like 50 years, or something. [¶] I don't want to put you people in jail, but you seem to just try to make a mockery of the system, not only by not paying your taxes but by manipulating the system. [¶] I have given you every opportunity to retain counsel. . . ." Exh. 3, RT 10/27/89 pp. 59-79.

The court then offered petitioners the following sentence: One year in county jail on each count, with all but 30 days in county jail suspended on each count, and with a $1000 fine on each count if income tax returns are filed within 15 days; payment of $1,456.76 for case

investigations costs; and payment of back taxes due. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 pp. 72-73. "Which would mean, said the court, "if you file your income tax returns, in accordance with your probation, within 15 days of today's date, that instead of doing three years, you will do 90 days. . . . [and pay] $3000 as opposed to $30,000," in fines. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 p. 72.

Petitioners rejected the court's terms of probation. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 pp. 72-76. Prior to rejecting the terms of probation, petitioner M. Monteleone conferred with her counsel, Mr. Fallman. Exh. 3, RT 10/27/89 pp. 74-75.

On October 27, 1989, the court sentenced petitioners as follows: One year each on Counts I, II, and III, for a total of three years in County Jail, each; $20,000 fine on each count, for a total fine of $60,000, each; and a $1,456.76 restitution fee. Exh. 1; Exh. 2; Exh. 3, RT 10/27/89 p. 78. Petitioners apparently were not remanded into custody. Exh. 3, RT 10/27/89 pp. 77-79.

On November 1, 1989, petitioners filed notice of appeal and application for release on their own recognizance pending disposition of appeal. Exh. 1, p. 8.

On June 4, 1990, petitioners filed appeals in Case Nos. FC28087 and FC28088 in the Superior Court of Solano County. Exh. 8, Appellant's Opening Brief; Exh. 10, Opinion on Appeal. Petitioners were represented by appointed counsel during the appeal, after they signed under penalty of perjury a "Financial Statement on Eligibility For Appointment of Counsel and Reimbursement." Exh. 7.

On August 20, 1990, the Solano Superior Court,

Appellate Department, denied petitioners' appeals. Exh. 10, Opinion on Appeal.

On September 5, 1990, the Solano County Superior Court, Appellate Department denied petitioners' petition for rehearing and application for certification of the case to the California Court of Appeal. Exh. 10, Order Denying Petition for Rehearing and Denying Application for Certification; Exhs. 8 and 9.

While still released on their own recognizance, petitioners filed a Petition for Writ of Habeas Corpus in the California Supreme Court on or about September 25, 1990, in Case Nos. S017634 and S017639. Exh.12; Exh.11.

On October 25, 1990, the California Supreme Court denied the petitions. CR 1, Pet.Exh.I; CR 21-24, Pet.Exh.I.

Also on October 25, 1990, execution of petitioners' three-year sentence in County Jail apparently commenced. Exh. 1, p. 11; CR 1, A. Mont.Pet.,p. 2, ¶5; CR 21-24, Exh. 2, p. 12; CR 2, M. Mont. Pet., p. 2, ¶5.

On November 21, 1990, petitioners filed their petitions for writ of habeas corpus with the United States District Court. CR 1, 2. The petitioners challenged their convictions and sentence alleging deprivation of the right to counsel, failure to meet venue and vicinage requirements, and improper arraignment. As relief they requested their "immediate release . .. from present custody" or for their custodians to "show cause why the petitioner[s] should remain confined and deprived of [their] liberty." CR 1,2.

On or about July 8, 1991, petitioners applied for "bail pending determination of petition for writ of habeas

corpus." CR 25 (A. Mont.); CR 28 (M. Mont.). In her petition M. Monteleone stated that she "was on bail without incident during trial and for 13 months following trial;" that "[b]ecause of [her] incarceration [she had] been removed from [her] position as an Air Traffic Control Assistant," and that "[u]pon [her] release [she] intend[s] to immediately move for reinstatement." CR 28, pp. 1-3. The district court denied the bail petitions on August 26, 1991. CR 26 (A. Mont.); CR 30 (M. Mont.).

On August 29 and August 30, 1991, the Magistrate filed his Findings and Recommendations in the case. *See*, App. B.

With respect to the deprivation of counsel claim, the Magistrate found that petitioners' habeas petitions were "completely lacking in merit on this ground," that the "case was no rush to justice," and that the Court had "never witnessed judicial patience of the sort exhibited by the Solano County bench." App.B; CR 28, pp. 2-14.

Likewise, the Magistrate found "without merit" petitioner's claim that his "First Amendment" rights were violated because the court improperly "demand[ed] . . . that he perform an act contrary to his religious belief . . . and take an oath" in filling out the financial statement required for appointed counsel. Pet. pp. 16-17, 21-22. The Magistrate found the trial court did not err in refusing to appoint counsel, and that the judge reasonably attempted to utilize the least restrictive means possible to have petitioners' attest to their financial status as required for appointed counsel. As the Magistrate observed, petitioners "were simply not willing to perform any task that might get them counsel and get the trial started," and "petitioner herein signed his petition to this court under

penalty of perjury without any problem being raised in this action." CR 28 (A. Mont.), pp. 9-14.

The Magistrate further found meritless petitioners' contentions that their convictions were in violation of the Sixth Amendment vicinage requirements. App. B. The Magistrate observed that it "is clear that California law allows for the prosecution of failure to file tax offenses in the county of residence. Cal. Rev. & Tax. Code § 19407," and that it was only petitioner who presumed that tax actions could only be prosecuted in Sacramento where tax returns are processed. "Petitioner's contention would produce an absurd result," the Magistrate recognized. CR 28 (A. Mont.) pp. 14-15.

Finally, the Magistrate likewise rejected, based on the evidence, petitioners' claims that they were improperly arraigned. App. B.

On or about September 30, 1991, petitioners each filed in the Ninth Circuit a "Petition for Application for a Writ of Mandamus for an Order Commanding Release of Petitioner on Bail Pending Determination of Petition for Writ of Habeas Corpus."

In the petitions, petitioners repeatedly emphasized that "if [they are] not released pending the determination of [their] Writ of Habeas Corpus [their] Petition[s] will become *moot* upon serving out [their] sentence[s]." Pets. ¶ 10, p. 3; M. Monteleone Pet. p. 8, ¶ 25, ¶ 26; A. Monteleone Pet., p. 7, ¶ 24, ¶ 25.

On October 15, 1991, the District Court denied the petitions and adopted the Magistrate's extensive findings issued on August 29 and 30, 1991. CR 28, 31, 33. Petitioners appealed on October 24, 1991. CR 36.

On or about February 18, 1992, petitioners filed

their opening briefs in the Ninth Circuit Court of Appeals.

In his Court of Appeals Opening Brief, petitioner A. Monteleone stated that he "has served his jail sentence and was released from custody on October 17, 1991." Pet. Court of Appeal Open. Brief, p. 5. In her Court of Appeals Opening Brief petitioner M. Monteleone stated she "has served her jail sentence and was released from custody on November 26, 1991." Pet. Court of Appeal Open. Brief, p. 5.

On December 8, 1992, the Court of Appeals dismissed petitioners appeal "as moot." On or about January 21, 1993, petitioners timely filed a "petition for rehearing and suggestion for rehearing en banc." In the rehearing petition, petitioners contended that their appeals were not moot, and set forth the reasons they believed their convictions had collateral consequences. They also asked the Court to allow for further briefing on the issues.

On March 4, 1993, the Ninth Circuit Court of Appeals denied petitioners' petitions for rehearing and "suggestion for rehearing en banc" of the Court's December 8, 1992 Memorandum.

On July 15, 1993, after a hearing, the Solano County Municipal Court granted petitioners credit for time served against their $60,000 fines. App. D. However, the Court did not waive their $1,456.76 restitution fees to the Franchise Tax Board as compensation for their investigatory expenses, and informed petitioners that they were still obligated to pay such restitution fees by June 15, 1994. App. D.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Deserving Of Plenary Consideration By The Court

This case is not deserving of plenary consideration by the Court. The case involves unique factual circumstances, and an unusual and tangled procedural history not susceptible to repetition. *See* App. B, D; Exhs. 1-11. The case does not seek to resolve legal questions of general importance transcending the litigant's narrow interests. Petitioners with the apparent assistance of the tax protest group the "Free Enterprise Society" are involved in extensive self-generated litigation, designed at delaying and abusing court processes to their own benefit. *See*, CR e.g., 18-21, Exh. 4-7; App. B and C; Crowe, *Tax Protest Prison Term Ends for Duo*, Fairfield Daily Republic, Nov. 27, 1991; *see also* Respondent's Court of Appeal briefs.[2/]

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2. Members of the "Free Enterprise Society," apparently believe that taxes are unconstitutional because the Sixteenth Amendment was never properly ratified.

Petitioner A. Monteleone in his "Supplement Number 2 To Motion To Dismiss" filed prior to trial in Solano Municipal Court on September 5, 1989 states that "Defendant herein has challenged the validity of the, so-called, legal tender laws on the basis of a fraudulent Certification of ratification of the Sixteenth Amendment to the United States Constitution." CR 19, Exh. 4. Likewise, in response to the State Franchise Tax Board's letter for taxes due in tax years 1983-1986, petitioners informed FTB in part as follows: "It has come to our attention that the non-apportioned income tax is a *voluntary* tax and congress's original intent and letter of all revenue laws made in pursuant to the passage of the Sixteenth Amendment was a proposed tax measured by the net profit and gain derived from the source and not on the capitol or other

Petitioners who successfully delayed their trials for months could have accepted the leniency of probation after their misdemeanor convictions, but instead elected substantial jail time and fines. Subsequently, petitioners were in custody and able to seek collateral federal habeas review only because they forestalled serving their jail sentences for about one year while they exhausted state court appellate remedies. *See*, CR 28.

Although it is not part of the record below, the State further notes that on July 15, 1993--after petitioners were released from custody--they requested and were granted a waiver of their $60,000 fines as credit for time served. App. D. The Municipal Court did not likewise waive the $1,456.76 in restitution fees to the Franchise Tax Board, but extended the time for payment to June 15, 1994. App. D.

Finally, in any event, the courts below which fully considered the substance of petitioners' appeals found petitioners' claims meritless, and further review of their arguments is unwarranted. *See*, App. B and C.

Accordingly, this fact-specific case with negligible implications is not certworthy.

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property (source). ¶ We have recently received conclusive and irrefutable certified documents pertaining to this from the National Archives in Washington D.C." CR 21, Exhs. 6-7.

In response, the Franchise Tax Board sent petitioners a letter which stated in part as follows:

"The Franchise Tax Board will not respond to correspondence objecting to state taxes on constitutional, religious or moral grounds. The reason for this is that hundreds of Board of Equalization and state and federal court decisions have been reached on such issues finding the arguments and objections to be frivolous and lacking in merit." CR 21, Exh. 6.

II. Federal Habeas Review Is Unwarranted Because Petitioners Have Not Demonstrated That Their Misdemeanor Tax Convictions Have A Material Effect On Present Legal Rights

Review also is unnecessary because petitioners have not met all threshold requirements for federal habeas corpus review of final state court judgments.

The 28 U.S.C. § 2254 statutory requirement of custody is satisfied as long as the petitioner is in custody of the state when the petition for writ of habeas corpus is filed, and release thereafter does not divest the court of its statutory jurisdiction. *Carafas v. LaVallee,* 391 U.S. 234, 238, 242-243 (1968) *overruling Parker v. Ellis,* 362 U.S. 574 (1960); *Engle v. Isaac,* 456 U.S. 107, 113-115, n. 7, 13 (1982).

Mootness, however, is a distinct requirement for federal review. The Court's "impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) *citing Liner v. Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964).

It is recognized that the "application of Article III to particular cases [is] often dependent upon subtle nuances in the Court's interpretation of the facts . . . [and that in] mootness inquiries . . . the range of factual questions which must be considered is greater than in other justiciability cases." Notes, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 377-378 (1974).

"[T]he principal focus in determining whether a case is moot is upon the existence or non-existence of any 'collateral consequences' that remain from the conviction." *Naylor v. Superior Court of Arizona,* 558 F.2d 1363, 1365-6 (9th Cir. 1977) *cert. denied* 435 U.S. 946 (1978).

Despite petitioners claim otherwise, it was consistent with Ninth Circuit practice for that Court to address the issue of mootness, sua sponte. As the Ninth Circuit properly has emphasized in the past, mootness is not a discretionary matter which a court is free to ignore. "Mootness is not merely a 'ducking device'. . . It goes directly to the jurisdiction and power of the federal courts to act." *Naylor v. Superior Court of the State of Arizona,* 558 F.2d at 1366; see also *Lane v. Williams,* 455 U.S. 624, 629 (1982); *North Carolina v. Rice,* 404 U.S. at 244, 246.

Although it is unclear upon exactly what bases the Ninth Circuit dismissed petitioners' habeas petitions, respondent notes that petitioners were "in custody" when they filed their federal petitions for writ of habeas corpus.

However, no case or controversy exists where, as here, a habeas petitioner's misdemeanor sentence has been served and no present "collateral consequences" remain as a result of the misdemeanor sentence or conviction. *Id.*

During the course of this long litigation, petitioners have failed to demonstrate any substantial collateral consequence flowing from their misdemeanor convictions that should permit them to obtain federal habeas relief.

Indeed, petitioners, themselves, recognized the negligible impact of their convictions and sentence when they requested release on their own recognizance pending determination of their habeas petitions.

Specifically, for example on or about September 30, 1991, following the Magistrate's findings in their cases on August 29 and August 30, 1991, petitioners each filed in the Ninth Circuit a "Petition for Application for a Writ of Mandamus for an Order Commanding Release of Petitioner on Bail Pending Determination of Petition for Writ of Habeas Corpus."

In the petitions, petitioners emphasized in bold type that "if [they are] not released pending the determination of [their] Writ of Habeas Corpus [their] Petition[s] will become moot upon serving out [their] sentence[s]." Pets. ¶ 10, p. 3. Petitioners also stated that:

> "Because of the District Court's large number of civil actions now pending and voluminous record submitted to the district court for review, by the California Assistant Attorney General . . ., petitioner[s] contends [they] will serve [their] sentence prior to the determination of the Petition for Writ of Habeas Corpus therefore mooting [their] Petition[s] for Writ of Habeas Corpus contrary to the holding in *North Carolina v. Rice* (1971 404 U.S. 244); *Flast v. Cohen,* 1968 392 U.S. 83 . . . ." M.Monteleone Pet. p. 8, ¶ 25; A. Monteleone Pet., p. 7, ¶ 24.

Petitioners likewise contended: They "should not have to remain incarcerated, and then released at the last possible moment before serving [their] sentence[s] out thereby preventing [their] Writ of Habeas Corpus from becoming moot. However, it now appears that this is the point that these proceedings have reached. *Boyer v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968). . . ." M.

Monteleone Pet. p. 8, ¶ 26; A. Monteleone Pet. p. 7, ¶ 25.

The allegations set forth in petitioners' Ninth Circuit rehearing petitions, and again in their certiorari petitions, do not dispel petitioners' original candid assessment of impending mootness, or otherwise demonstrate that petitioners' misdemeanor tax offense convictions carry actual legal "collateral" disabilities sufficient to warrant federal habeas review.[3/]

Although it is an important function of our judiciary to protect citizens from erroneous convictions, the mootness inquiry in habeas attacks on state judgments should be a stringent one. *See, Cox v. McCarthy,* 829 F.2d 800, 803-804 (9th Cir. 1987). Where as here habeas relief is sought by out-of-custody state defendants who have had full access to the state appellate process, the federal courts should not be burdened with the broad task of further reviewing all state misdemeanor convictions, without proof of continuing material harm to the

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3. Petitioners complain of the following general collateral consequences as a result of their misdemeanor tax conviction: (1) The "stigma" of being labeled "tax protestors" or "tax evaders" "[g]iven today's climate about paying one's 'fair share' of taxes."; (2) sentence enhancement in future cases; (3) impeachment of credibility in future cases; (4) bail enhancement; and that (5) "Many state, federal, local and private employment forms require disclosure by the applicant of any convictions or sentences served by the applicant [e.g. Federal SF Form 171]." Cert. Pet., pp. 12-15.

Petitioners also complain of the following specific consequences of their misdemeanor tax convictions: (1) M. Monteleone's conviction was "used to terminate her from her job as air traffic assistant with the FAA, as well as keeping her from being re-instated." Cert. Pet. pp. 14-15.

complainants. *See*, 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.4, at 310-311 (2d ed. 1984).

As this Court has observed with respect to the important parameters of collateral habeas review:

> "Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Lane v. Williams,* 455 U.S. at 632-633 n. 13.

Accordingly, the bare allegation that a social "stigma" might attach to a conviction should not create the necessary "collateral consequence" predicate for federal habeas corpus relief. *Naylor v. Superior Court, 558 F.2d* at 1365; *see also, Bjerkan v. U.S.,* 529 F.2d 125 (7th Cir. 1975); *Broughton v. North Carolina,* 717 F.2d 147, 148-149 & n. 3 (4th Cir. 1983) *cert. denied* 466 U.S. 940 (1984) ("continued reputational interests" which petitioner has in overturning her criminal contempt conviction" is not "legal consequence" which is remediable in federal habeas petition).

Indeed, such a moral claim rings hollow in this case, where petitioners voluntarily and publicly align themselves with a "Sixteenth Amendment was never properly ratified" tax protest group, and where any alleged employment and financial woes would stem equally from petitioners' decision not to pay *federal* taxes as of 1983. At trial petitioner A. Monteleone told the court that he had resigned from his government job at Mare Island so that the IRS would not continue to levy his paycheck. *See* Exh. 3, 9/20/89 RT 6-11. Petitioner M. Monteleone also

stated "the IRS is levying my paycheck," and that she made only $75 a week. *See* Exh. 3, 9/20/89 RT 6-11.

Likewise, it would be inappropriate to presume that M. Monteleone lost her job at the FAA and is barred from reinstatement solely as a result of her misdemeanor state tax convictions.

It is respondent's understanding that under federal regulations, petitioner M. Monteleone could be removed and barred from FAA employment based upon her failure to pay federal tax debts, and that her conduct in denouncing her tax responsibilities could be just cause for her employers to question her ability to reliably perform her public-safety related job. See App. F, e.g. United States Office of Government Ethics, *Standards of Ethical Conduct For Employees of the Executive Branch*, Part I, Executive Order 12674 and 5 C.F.R. Part 2635 (August 1992) (setting forth requirement that employees "shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law."); Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3, § 300 (providing that FAA employees "must conduct themselves while off duty in a manner that will not cause the public to question their reliability and trustworthiness . . .").

Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3, §305 (a) specifically provides in part:

> "All employees are expected to discharge their private financial obligations and to maintain a reputation in the

> community for honoring debts. Failure without sufficient excuse or reason to honor valid debts, including claims based on court judgments and tax delinquencies, or to make and adhere to reasonable arrangements for settlement, will constitute grounds for disciplinary action.".

The failure to honor financial obligations is pertinent to petitioner's federal employer regardless of whether petitioner is actually *convicted* of a state tax code misdemeanor, or simply has decided not to pay state or federal income tax, because both relate to the employer's assessment of petitioner's judgment capabilities.[4/]

Furthermore, respondent notes that in these uncertain economic times, petitioner's reinstatement to the FAA or other federal job is hardly guaranteed. Although not part of the record, it is respondent's understanding from speaking with Ms. Jan Proper Supervisory Personnel Manager at the FAA Western Pacific Regional Office that the FAA is not presently hiring persons for the position of

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4. On January 16, 1991, Petitioner M. Monteleone filed in the U.S. District Court an "Emergency Application For Release on Bail Pending Habeas Corpus Determination." CR 5. In the application, petitioner states that her employer would soon be terminating her from her employment due to her absence from work as follows:

"Petitioner has been informed on January 7, 1991, by her place of employment (FAA), that unless she returns to work by January 30, 1991 that she will be considered AWOL and terminated from her job. Petitioner, who applied for work furlough release, was denied such release for the reason that the FAA administrative examination board, upon review of her petition for Habeas Corpus relief, determined that petitioner's confinement was a direct result of her failure to employ counsel in a timely fashion at trial." CR 5.

Air Traffic assistant (the job formerly held by M. Monteleone), and that it may be eliminating such positions by Spring 1994 due to economic and resource considerations.[5]

Petitioners offer no proof that their employment actually has been impeded by virtue of their convictions. And where as here a petitioner has retired and may have no real interest in seeking employment, or where the petitioner has other legal difficulties which also would operate to preclude that petitioner from obtaining a particular job, the law should not presume that petitioner has been occupationally disabled by virtue of a misdemeanor conviction. *Cf., Malloy v. Purvis,* 681 F.2d 736, 737-740 (11th Cir. 1982); *cert. denied*, 460 U.S. 1071 (1983) ("blemish on one's record resulting from one conviction is [not] enough of a collateral consequence to prevent a habeas corpus petition from being moot, where the petitioner is not in custody and where the petitioner has multiple convictions").

It is one thing when a criminal conviction materially affects a person's present ability to remain a licensed professional, or otherwise has effects of a "substantial nature" such as deprivation of basic rights such as "the right to vote and the right to serve on a jury," i.e., consequences more generally associated with felony convictions. *See*, *Bjerkan v. United States,* 529 F.2d at 126-127; *see generally*, Comment, *Civil Disabilities of Felons*, 53

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5. Respondent brings to the Court's attention, these and other facts which are not part of the record below, so that the Court can fully evaluate the merits of granting review and "flush the problems" of this case "at the certiorari stage." *Conway v. Adult Authority,* 396 U.S.107, 109-110 (1969).

Va.L.Rev. 403 (1967). It is entirely another matter when the criminal conviction has only speculative consequences or consequences which would be imposed only in the event of the complainant's own future wrong-doing. Cf. *Aaron v. Pepperas,* 790 F.2d 1360, 1362 (9th Cir. 1986).

A person can control whether or not s/he violates a criminal law and courts should be reluctant to find collateral consequences when the possibility that a petitioner will be adversely affected in the future depends solely upon a petitioner's own misdeeds. *See Lane v. Williams,* 455 U.S. at 632-633, n. 13; Cf. *Reimers v. State of Oregon*, 863 F.2d 630, 632 (9th Cir. 1988).

For similar reasons, petitioners' additional concern that they may be impeached in possible future trials, or otherwise legally handicapped by the blemish on their record resulting from failure to file state tax forms is, in a practical sense, unavailing.

It is a fact that petitioners have not filed tax returns since 1982. Should the matter be raised in the future in any judicial proceeding, petitioners will suffer the same adverse practical consequences from their failure to file federal tax returns--even though the federal government did not pursue a criminal action against them. Failure to file a federal tax return involves the same type of fraudulent irresponsible conduct which underlies their state tax code convictions. It is this underlying conduct, not the *fact* of conviction which can be used to impeach their credibility as trial witnesses. See *People* v. *Wheeler*, 4

Cal.4th 284, 288 (1992).[6/]

Likewise, it is speculation that the misdemeanor convictions would have an adverse legal impact on petitioners should they encounter future legal proceedings. For example, state tax code violations are not, like some designated crimes (e.g., sex and gun offenses), specifically used in sentence enhancement. Similarly, because petitioners skirted no court appearances in this litigation, they probably would not be subject to bail penalties in a future action.

Therefore, while it may be the presumption that convictions carry continuing collateral "legal" consequences in cases brought on direct appeal (see *Sibron v. New York*, 392 U.S. 40, 51, 53-58 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106, 108, n.3 (1977)), such a presumption should not likewise attach in cases where federal habeas relief of state court judgments is sought.

In these circumstances, neither this Court nor others should be compelled to speculate or presume that there are always adverse consequences from the imposition of a criminal sanction. *See*, *North Carolina v. Rice*, 404 U.S. at 244 (remanding to the lower court for a factual determination of whether more serious adverse consequences would flow from a two-year sentence than from a nine-month suspended sentence.).

Otherwise, the collateral consequence doctrine has expanded to such an extent that the mootness inquiry in

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6. Respondent also observes that before such impeachment would be permitted, the trial court generally first would have to determine that the evidence was more probative than prejudicial. *People* v. *Wheeler* 4 Cal.4th at 284.

habeas appeals of state convictions is virtually obsolete, having been replaced by a flat rule that a petitioner should be entitled to have any final state conviction reviewed by the federal courts. Courts have not found "the Supreme Court desired to hold that a conviction in and of itself constituted a collateral consequence" and thus have "refuse[d] to sanction a rule that would effectively abrogate the meaning and purpose underlying the requirement of proving collateral consequences." *See, Malloy v. Purvis,* 681 F.2d at 738-740.

The "doctrine of collateral consequences [should be] a narrow exception to the general mootness rule," and not the exception which swallows the rule. *See, Robbins v. Christianson,* 904 F.2d 492 (9th Cir. 1990) and *see id. at pp. 496-497, dissenting op.*, Noonan, J.

Accordingly, in habeas cases such as this one, speculative nonstatutory disabilities from a state court misdemeanor sentence or conviction such as the effect of the jail term on employment prospects or on a sentence imposed in a future criminal proceeding should be insufficient to save a case from being moot once the sentence has been served. *Lane v. Williams,* 455 U.S. at 631-633; *Carafas v. LaVallee,* 391 U.S. at 237; see also *U.S. v. Sultani,* 704 F.2d 132 (4th Cir. 1983) (appeal from traffic violation was moot after successful completion of probationary period as no collateral consequences from the conviction); *Arnold v. Panora,* 593 F.2d 161, 163-164 (1st Cir. 1979) (challenge to drivers' license suspension moot where collateral consequences such as damage to reputation and possible adverse treatment by insurance companies were practical not legal); *Cancino v. Craven,* 511 F.2d 1371, 1373 (9th Cir. 1975) *cert. denied* 423 U.S.

875 (1975) (Payment of $50 fine mooted appeal from an attorney's contempt conviction, despite the contention that the conviction might have consequences on his future career for political office).

A material effect on the petitioner's present legal rights should be necessary to permit habeas review of a state court misdemeanor conviction.

Because petitioners' unsupportable allegations here do not satisfy this burden or any Article III threshold, the case is properly dismissed as moot.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

In the alternative, we request that the Ninth Circuit Court of Appeals order dismissing the habeas petitions be vacated and the matter be remanded to the Court of Appeals for a decision on the merits.

Dated: September 3, 1993.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General

ANN K. JENSEN
Supervising Deputy Attorney General
[Counsel of Record]
ENID A. CAMPS
Deputy Attorney General

Attorneys for Respondent

EAC:cmb
SF93US0003